TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provision and Federal Rules of Civil Procedure Involved 3

Statement of the Case 3

Reasons for Granting Writ 8

1. The Tenth Circuit Refused to Follow the Rule of *Hansberry v. Lee*, 311 U.S. 32 (1940), That Due Process of Law in Class Actions Requires Adequate Representation of Absent Class Members. 8
2. The Decision Below Conflicts in Principle With a 1973 Decision of the Fifth Circuit. 11
3. The Number and Size of Rule 23(b)(3) Class Actions Require a Definitive Determination of the Interrelationship Between the Fair and Adequate Representation Necessary Under Rule 23(a)(4) and Notice Under Rule 23(c)(2). 14
4. This Court Should Halt the Practice in Rule 23(b)(3) Class Actions of Postponing the Class Determination Under Rule 23(c)(1) Until a Settlement Is Proposed and Then Giving a Single Combined Notice Under Rules 23(c)(2) and 23(e). 15
5. The Tenth Circuit Exceeded the Proper Scope of Appellate Review and Undercut the Trial Court's Discretion to Grant Relief Under Rule 60(b) from a Judgment in a Class Action 18

Conclusion 22

Appendix (Separately printed):

Opinion of the Tenth Circuit Court of Appeals, August 13, 1974 ..... A1
Judgment of the Tenth Circuit Court of Appeals, August 13, 1974 ..... A21
Opinion of the District Court for the Western District of Oklahoma Designated "Opinion No. 4", June 7, 1973 ..... A22
Supplementing Opinion of the District Court Designated "Opinion No. 4A", July 25, 1973 ..... A52
Judgment of the District Court, August 17, 1973 .... A53
Opinion of the District Court Designated "Opinion No. 2", December 18, 1972 ..... A56
Amendment V to the Constitution of the United States A99
Rule 23 of the Federal Rules of Civil Procedure A99
Rule 60 of the Federal Rules of Civil Procedure A103

TABLE OF AUTHORITIES

Cases

Bibeau v. Northeast Airlines, Inc., 429 F.2d 212 (D.C. Cir. 1970) 19

Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), *rev'd on other grounds*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded*, 94 S.Ct. 2140 (1974) 2, 9, 13, 14, 15

Fischer v. Kletz, 41 F.R.D. 377 (S.D.N.Y. 1966) 13

Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973) 11, 12, 13, 14

Hansberry v. Lee, 311 U.S. 32 (1940) 2, 8, 9, 10, 11, 12

Hohmann v. Packard Inst., 43 F.R.D. 192 (N.D. Ill. 1967), *rev'd on other grounds*, 399 F.2d 711 (7th Cir. 1968) 13

Hutton v. Fisher, 359 F.2d 913 (3d Cir. 1966) 19

Klapprott v. United States, 335 U.S. 601 (1949) 3, 19

Laguna Royalty Co. v. Marsh, 350 F.2d 817 (5th Cir. 1965) 19

Nichols v. United States, 460 F.2d 671 (10th Cir. 1972), *cert. denied*, 409 U.S. 966 (1972) 21

Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538 (2d Cir. 1963) 19

Rooks v. American Brass Co., 263 F.2d 166 (6th Cir. 1959) 19

Smith v. Jackson Tool & Die, Inc., 426 F.2d 5 (5th Cir. 1970) 19

State of Ohio v. Crofters, Inc., et al., No. 72-81 ..... 4, 7

United States v. National Ass'n of Real Estate Boards, 339 U.S. 485 (1950) 20

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 20

Constitution, Statutes and Rules

Constitution of the United States, Fifth Amendment 2, 3

Federal Rules of Civil Procedure:

Rule 23 .....3, 14, 15, 16, 22
Rule 23(a) 16
Rule 23(a) (4) 2, 12, 14, 15
Rule 23(b) 16
Rule 23(b) (1) 13
Rule 23(b) (2) 11, 12, 13
Rule 23(b) (3) 2, 4, 11, 12, 13, 14, 15
Rule 23(c) (1) 2, 15, 16, 18
Rule 23(c) (2) 2, 6, 10, 12, 14, 15, 18
Rule 23(c) (4) 16
Rule 23(e) 2, 15, 18
Rule 60 3
Rule 60(b) 7, 10, 13, 18, 20, 21, 22
Rule 60(b) (1) 7
Rule 60(b) (4) 7, 9, 10
Rule 60(b) (6) 3, 7, 10, 19, 20

Securities Act of 1933, Sec. 22(a) 4
Securities Exchange Act of 1934, Sec. 27 4
28 U.S.C. Section 1254(1) 2
28 U.S.C. Section 1407 .....21, 22

Texts

Manual for Complex Litigation (1973) 16, 18
7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, Sec. 1765, p. 618 (1972) 8
11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, Sec. 2857, pp. 157-158 (1973) 18-19, 20
Sec. 2872, pp. 261-262, n.6, Supp. p. 8 21

Supreme Court of the United States

October Term, 1974

No. _____

STATE OF OHIO,
Petitioner,

vs.

ARTHUR ANDERSEN & CO., JACK L. CLARK, GORDON H. McCOLLUM, GLENN R. MILLER, MONTGOMERY CO., and WALSTON & CO., INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Tenth Circuit

Petitioner the State of Ohio respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 13, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix at p. A1. The opinion of the District Court for the Western District of Oklahoma, reported at 59 F.R.D. 667 (1973), appears in the Appendix at p. A22. The supplementing opinion of the District Court, not reported, appears in the Appendix at p. A52.[1]

1. This case is part of a complex, multidistrict action known as "Four Seasons Securities Laws Litigation, M.D.L. 55". The District Court opinion approving the settlement which Ohio has attacked is reported at 58 F.R.D. 19 and appears in the Appendix at p. A56.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does not due process under the Fifth Amendment and this Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), require adequate representation of the absent members of a plaintiff class throughout an action under Rule 23(b)(3) even though notice may have been given?

2. Can the express requirement of Rule 23(a)(4) that there be fair and adequate representation of absent class members in all class actions be ignored in Rule 23(b)(3) class actions merely because of the notice and opt-out provisions in Rule 23(c)(2) in view of this Court's statement in *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140, 2152, (1974) that "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided"?

3. Is amalgamating the class action determination under Rule 23(c)(1) with the procedure for judicially approving a compromise under Rule 23(e) and issuing only a single combined notice under Rules 23(c)(2) and 23(e) permissible in a Rule 23(b)(3) case in view of the potentially damaging effect such telescoping has on the rights of absent class members?

4. Should not the scope of appellate review over the District Court's discretion "to vacate judgments whenever such action is appropriate to accomplish justice" under the

"'other reason' clause" of Rule 60(b)(6), *Klapprott v. United States*, 335 U.S. 601, 614-615 (1949), be limited to correcting abuse of discretion in complicated, multidistrict, class action litigation?

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

This petition for certiorari involves the due process clause of the Fifth Amendment to the United States Constitution and Rules 23 and 60 of the Federal Rules of Civil Procedure. These are set out in the Appendix at p. A99, p. A99, and p. A103 respectively.

STATEMENT OF THE CASE

In March, 1970 the State of Ohio (Ohio) lent $4,000,000 to Four Seasons Nursing Centers of America, Inc. (Four Seasons), a Delaware Corporation with its principal place of business in Oklahoma City. The loans were evidenced by three promissory notes with interest. Three months later, on June 26, 1970, Four Seasons filed a petition for reorganization under Chapter X of the Bankruptcy Act.

Ohio has persistently pursued every avenue by which it might recover its loans. It filed a claim for $4,111,000 in the reorganization. It sought reclamation of the proceeds of its loans in the reorganization court and appealed the denial of its reclamation petition.[2] App. pp. A25-A26; 59 F.R.D. at 670-671. As an ordinary creditor (Class C), Ohio consistently objected to the inclusion of creditor-stockholders (Class G) in the plan of reorganization and

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2. The Tenth Circuit's opinion affirming the denial of the reclamation petition is reported at 465 F.2d 25 (1972).

filed three separate appeals challenging the plan so drafted.[3] App. p. A28; 59 F.R.D. at 671-672.

Thus, a conflict of position between Ohio and the creditor-stockholders was early manifest. Certain of these creditor-stockholders and other security holders filed several lawsuits as class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure against the former officers, directors, accountants, and investment bankers of Four Seasons. App. p. A57; 58 F.R.D. at 21. These cases, which were later designated as class actions (App. p. A80; 58 F.R.D. at 32), are the subject of this petition.

Jurisdiction was based on the Securities Act of 1933, §22(a), the Securities Exchange Act of 1934, §27, and pendent jurisdiction. In May, 1971 ten actions were consolidated for pretrial proceedings in the Western District of Oklahoma and assigned to Senior District Judge Roszel C. Thomsen of Baltimore by order of the Judicial Panel on Multidistrict Litigation. 328 F. Supp. 221. This conglomerate became "M.D.L. 35". Many additional cases were later transferred to it.

In March, 1972 Ohio filed three cases of its own arising out of its loans to Four Seasons. One was *State of Ohio v. Crofters, Inc. et al.*, No. 72-81, in the United States District Court for the Southern District of Ohio. The other two cases were in the state court. In *Crofters* Ohio alleged that its loans to Four Seasons were procured in violation of federal and state securities laws and by common law fraud. Jurisdiction was also based on the Securities Act of 1933, §22(a), the Securities Exchange Act of 1934, §27, and pendent jurisdiction. The defen-

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3. In contrast, Fink, one of the named plaintiffs and representatives, also attacked the reorganization plan by an appeal, but on the ground that it was too generous to ordinary creditors (Class C), such as Ohio.

dants in Ohio's action included several former officers and directors of Four Seasons who were also defendants in M.D.L. 55, as well as agents and others associated in the procurement of the Ohio loans. App. p. A29; 59 F.R.D. at 672-673. Ohio's action was transferred to M.D.L. 55 but not until July 17, 1973 (361 F. Supp. 636), approximately a year after the events described below.

On July 20, 1972, after extensive hearings, Judge Thomsen announced that he was ready to designate five actions as class actions and define tentatively two plaintiff classes. App. pp. A31, A76-A77; 59 F.R.D. at 673; 58 F.R.D. at 30. Ohio, which had not participated in any M.D.L. 55 proceedings, was not present at the July, 1972 hearings. App. p. A7. No notice had been sent to any absent member of the purported classes up to that time, and none was sent until after September 21, 1972. App. pp. A79-A80; 58 F.R.D. at 32. Upon Judge Thomsen's announcement, all counsel present asked the court to defer any determination of the classes so that the parties could continue settlement negotiations. The judge acceded. App. p. A32; 59 F.R.D. at 674.

The period from July 20 to September 21, 1972 proved critical to Ohio's interests. At that time, the self-appointed representatives, who were all beneficiaries of the reorganization plan which Ohio was challenging in its appeals, were negotiating a settlement which had serious side effects for Ohio, such as: (1) discounting Ohio's federal and state securities claims by 90% while valuing their own claims at 100%; (2) ignoring Ohio's special claim for interest; (3) rejecting Ohio's claim for punitive damages; and (4) expressly reserving all rights, claims, and causes of action of the M.D.L. 55 defendants against Ohio. App. pp. A79-A85, A48-A51; 58 F.R.D. at 32-35; 59 F.R.D. at 682-683.

On September 21, 1972 the proposed settlement was presented to Judge Thomsen by counsel in M.D.L. 55. The order entered that day preliminarily approved the proposed settlement and directed that notice be sent to members of the two plaintiff classes described. The definition of one class encompassed Ohio. App. p. A9. The order, with many exhibits, included the form of notice contemplated by Rule 23(c)(2). App. p. A44, n.15; 59 F.R.D. at 679, n.15. Ohio received two copies of the order by registered mail at the Office of the Attorney General, one on October 6, 1972 and the other on October 10, 1972. Notice of the proposed settlement was also published in The Wall Street Journal. App. p. A35; 59 F.R.D. at 675. No one for Ohio read either the copies of the notice received by the Attorney General's Office or the published notice at that time. App. pp. A35, A42-A43; 59 F.R.D. at 675, 679.

From July 20 to September 22, 1972, Ohio was separately negotiating with the Trustee and his counsel to settle Ohio's three appeals on the plan of reorganization and its allocation of shares in the reorganized company to creditor-stockholders. App. pp. A31-A33; 59 F.R.D. at 672-673. Throughout its negotiations before and after September 22, 1972 with the Trustee and his counsel, as well as in the discussions which Ohio's assistant attorneys general had with counsel for some of the M.D.L. 55 defendants, Ohio acted "in the belief that Ohio would not be included in the M.D.L. 55 classes." The District Court so found. App. p. A42; 59 F.R.D. at 678-679. While rejecting any criticism of counsel for the M.D.L. 55 defendants or the Trustee, the District Court also found that the course of dealings from July 20 through September 22, 1972 "lulled Ohio's attorneys into the belief that the statement made to them [on September 22 by counsel for the Trustee] 'that the case had been

settled around Ohio' meant that Ohio was not involved in the M.D.L. 55 settlement." App. p. A42; 59 F.R.D. at 679.[4]

Ohio first read the whole order of September 21, 1972 about December 5th after being alerted by statements of counsel for one of the M.D.L. 55 defendants at a pretrial hearing in the *Crofters* case. Ohio's motion for relief from judgment under subdivisions (1), (4), and (6) of Rule 60(b) was promptly filed with Judge Thomsen in Baltimore on December 21, 1972. App. p. A38; 59 F.R.D. at 677.

After depositions by both sides, two oral arguments, and extensive briefs, the District Court granted Ohio's motion on the "other reason" ground of Rule 60(b)(6). App. pp. A53-A54. Having stated that "Ohio has made a strong case that the judgment should be held void as to all the claims of Ohio," Judge Thomsen continued:

> To the considerations referred to in the last preceding paragraph must be added the chilling effect of the dealings which the attorneys for Ohio had with the attorney for the Chapter X Trustee and the attorneys for some of the M.D.L. 55 defendants, discussed under the heading "60(b)(1)—Excusable Neglect", above.

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4. In 1972 two assistant attorneys general for Ohio were in charge of Ohio's claims arising out of its loans to Four Seasons. The first was Anthony L. Gretick who left the Office of the Attorney General on or about October 26. He saw a copy of the order at the office of counsel for the Trustee in mid-October, "riffled" through the pages, and asked that a copy be sent to him, "which was not sent". App. p. A42; 59 F.R.D. at 679. The second was Ronald B. Brown who was designated lead counsel on Mr. Gretick's departure. Mr. Brown saw a copy of the order in his office in late October while examining the many papers he inherited from Mr. Gretick. Mr. Brown read the first page of the order, "thumbed through some additional pages", and assumed Mr. Gretick had done what was necessary in view of its being over a month old. App. p. A35; 59 F.R.D. at 675.

> The court concludes that the totality of the evidence requires that Ohio be relieved from the operation of the judgment. App. p. A51; 59 F.R.D. at 683.

The Tenth Circuit reversed Judge Thomsen's grant of relief to Ohio and ordered the judgment reinstated.

REASONS FOR GRANTING WRIT

1. The Tenth Circuit Refused to Follow the Rule of Hansberry v. Lee, 311 U.S. 32 (1940), That Due Process of Law in Class Actions Requires Adequate Representation of Absent Class Members.

The Tenth Circuit specifically rejected *Hansberry* as either governing or guiding authority. After acknowledging *Hansberry* as "the landmark due process decision in class action law," the appellate court departed from the existing authorities,[5] which interpret the decision "to establish adequate representation as a prerequisite for due process in class actions." App. p. A17, n.8. Ultimately the Tenth Circuit cut itself completely free from *Hansberry* and stated that:

> While adequacy of representation has been upheld as an extremely important factor in due process considerations in class actions and has, in fact, been deemed a prerequisite thereto under most circumstances, *we do not feel bound in the instant proceeding by Hansberry and its progeny*. . . . App. p. A18 (emphasis added).

From there it was an easy step to the conclusion "that due process may be satisfied by notice alone and that, where

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5. *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §1765, p. 618 (1972) and cases cited therein.

due process is thus satisfied, adequacy of representation need not be shown as a matter of constitutional necessity." App. p. A19.

In *Hansberry*, this Court determined that persons seeking to enforce a restrictive covenant could not and did not adequately represent those opposed to its enforcement and that there could be no proper class consisting of both. *Id.* at 44. The Court then concluded (1) that a prior judgment could not be res judicata as to the petitioners in *Hansberry* because they had not been adequately represented in the original action, and (2) that the petitioners had been denied due process in the court below. *Id.* at 44-46. The Court recognized that absent class members ". . . may be bound by the judgment where they are in fact adequately represented by parties who are present. . . ." *Id.* at 42-43. But the Court then held that ". . . a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Id.* at 45.

In discussing Ohio's motion under Rule 60(b)(4), the District Court properly applied and followed the rule that due process in class actions requires adequate representation of absent class members:

> But where a party has not appeared, although he has received due notice, the judgment will not be binding upon him unless he has had representation which meets the tests of Rule 23(a)(3) and (4), quoted above. Adequacy of representation cannot take the place of notice;[6] nor can notice take the place of

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6. As this Court recently held in *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140, 2152 (1974).

adequacy of representation. App. p. A44; 59 F.R.D. at 680.

Even though the District Court granted Ohio's motion on the "other reason" ground set out in Rule 60(b)(6), rather than the voidness ground in (b)(4), it repeatedly stated that Ohio had "made a strong case that the judgment should be held void as to all the claims of Ohio."[7] App. pp. A51, A53, A54; 59 F.R.D. at 683.

In addition to not feeling bound by *Hansberry*, the Tenth Circuit justified its rejection of adequate representation as a constitutional requirement for due process in this case in order "to prevent one-way intervention". App. p. A19. Yet, the court failed to explain how the circumspect exercise of judicial discretion under Rule 60(b)(6) to relieve one party[8]—Ohio—from one class action judgment could constitute "'a return to one-way intervention under a new guise.'" *Id.* This prediction is baffling since the District Court found that the attorneys for the Trustee and the M.D.L. 55 parties "assumed that Ohio would opt out when it received the notice" (App. p. A34; 59 F.R.D. at 675) and Ohio had had the right under Rule 23(c)(2) unilaterally to opt out at an earlier point.

In other words, the granting of Ohio's motion under Rule 60(b) put the parties exactly where they thought they would be when they negotiated the settlement. Ohio was merely permitted to exercise its right to opt out after the date fixed by the September 21st order.

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7. The Tenth Circuit assumed "the conclusion of the court below on the adequacy question to be correct. . . ." App. p. A16.

8. Motions also under Rule 60(b) were denied by Judge Thomsen to movants Kleinman and Phillips. 60 F.R.D. 598 (1973); M.D.L. 55, Opinion No. 8 (July 10, 1974).

The District Court correctly recognized the constitutional due process requirement of both notice and adequate representation to bind absent class members and properly applied the *Hansberry* principle in a Rule 23(b)(3) class action. On the other hand, the Tenth Circuit was wrong not only in concluding that adequate representation could be dispensed with if there was notice but also in ignoring the mandate of *Hansberry* in so doing. In light of the damage this precedent could cause absent class members in Rule 23(b)(3) actions, a writ of certiorari should issue to correct the appellate court's error.

2. The Decision Below Conflicts in Principle With a 1973 Decision of the Fifth Circuit.

The Fifth Circuit, in a class action under Rule 23(b)(2), recently applied the *Hansberry* rule that due process requires adequate representation of absent class members throughout all stages of the case. *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). In that case, the named plaintiff sought to enjoin enforcement of a Texas statute providing for automatic suspension of the driver's license and motor vehicle registration receipt of any uninsured motorist involved in an accident who did not post security. The District Court held that res judicata barred the named plaintiff and the class in their claim for retroactive application of the declaration of the statute's unconstitutionality because they had been members of an identical class in a prior action. Only prospective relief had been granted to the class in the earlier case although the named plaintiff had obtained retroactive relief for himself but did not appeal to secure the same relief for the class.

The Fifth Circuit reversed because inadequate representation of absent class members in the earlier case had

denied them due process, citing *Hansberry* and other cases. *Id.* at 74-75. In refusing to apply res judicata, the court of appeals held that "[d]ue process of law would be violated . . . unless the court . . . can conclude that the class was adequately represented in the first suit." *Id.* at 74. The court made it clear that *Gonzales* was not precluded from raising the adequate representation issue because his attorney "was aware" of the proceedings and judgment in the earlier class action. *Id.* at 76. In noting that Rule 23 (a) (4) must be "stringently applied", the court observed that

> The purpose of Rule 23 would be subverted by requiring a class member who learns of a pending suit involving a class of which he is a part to monitor that litigation to make certain that his interests are being protected; this is not his responsibility—it is the responsibility of the class representative to protect the interests of all class members. *Id.* at 76.

In this case, the Tenth Circuit attempted to distinguish *Gonzales* on the ground that *Gonzales* was not under Rule 23(b)(3) but Rule 23(b)(2) which is not subject to an express notice or opt-out provision. It stressed that Ohio had been given the benefit of these provisions but completely failed to address the point that Ohio was represented in the settlement by persons with adverse interests. App. p. A17, n.9.

By concluding that mandatory notice to class members under Rule 23(c)(2) in a (b)(3) class action is sufficient—by itself—to satisfy the requirements of due process, the Tenth Circuit overlooked the substantial authority that adequate representation is equally, if not more, important in Rule 23(b)(3) actions than in other class actions. This stems from the lack of any ongoing relationship or true

identity of interest among members of a (b)(3) class, which tends to assure adequacy of representation in (b)(1) and (b)(2) cases. Indeed, the Fifth Circuit had recognized this by citing (b)(3) cases in support of its conclusion on the importance of adequate representation. *Gonzales v. Cassidy, supra,* text at 75, n.15.[9]

Ohio's case is a fortiori to *Gonzales* which involved a collateral attack based on inadequacy of representation whereas Ohio was granted relief on a direct attack under Rule 60(b). When Ohio's Rule 60(b) motion was filed, Judge Thomsen had already lived with M.D.L. 55 for 19 months. In referring to the "strong case" Ohio had made for voidness of the judgment as to it, Judge Thomsen implicitly recognized that continuing adequate representation, in addition to notice, is necessary throughout a Rule 23(b)(3) class action and that the *Gonzales* insistence on such representation is not to be confined narrowly to Rule 23(b)(2) cases.

The Tenth Circuit expressed concern for the stability of judgments in class actions in reversing the District Court. In contrast, the Fifth Circuit, in *Gonzales,* imposed a continuing duty on the district judge to make certain that absent class members are adequately represented throughout the action. The approach of the Fifth Circuit is a fairer and more positive way of achieving binding judgments. Only this Court can resolve the conflict in principle between these circuits.

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9. The Fifth Circuit cited *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 562 (2d Cir. 1968), *rev'd on other grounds,* 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded,* 94 S.Ct. 2140 (1974); *Hohmann v. Packard Inst.,* 43 F.R.D. 192, 196 (N.D. Ill. 1967), *rev'd on other grounds,* 399 F.2d 711 (7th Cir. 1968), and *Fischer v. Kletz,* 41 F.R.D. 377, 382 (S.D.N.Y. 1966).

3. The Number and Size of Rule 23(b)(3) Class Actions Require a Definitive Determination of the Interrelationship Between the Fair and Adequate Representation Necessary Under Rule 23(a)(4) and Notice Under Rule 23(c)(2).

In view of the complexity and popularity of Rule 23 (b) (3) class actions since the 1966 amendment of the rule, numerous questions concerning the definition and application of the various provisions of Rule 23 have inevitably confronted the lower federal courts. This Court provided considerable guidance in *Eisen v. Carlisle & Jacquelin*, 94 S.Ct. 2140 (1974). This case offers an excellent opportunity for the Court to shed light on another important aspect of the operation of Rule 23—the relationship between the requirement of fair and adequate representation of Rule 23(a)(4) and the notice requirement of Rule 23(c)(2).

In *Eisen*, also a Rule 23(b)(3) case, the Court held that adequate representation was not a substitute for notice. *Supra* at 2152. In this case, the Court has before it the converse question of whether notice is a substitute for adequate representation.

Pre-*Eisen*, Judge Thomsen held that "notice [cannot] take the place of adequacy of representation." App. p. A44; 59 F.R.D. at 680. Post-*Eisen*, the Tenth Circuit asserted that the interrelationship of notice and adequate representation "has never been completely and clearly articulated." App. p. A16. This is a curious assertion to be made after this Court's flat statement that "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." *Eisen v. Carlisle & Jacquelin, supra* at 2152. In light of this language in *Eisen* and the explicit

language of Rule 23(a)(4), it is even more perplexing that the court below concluded that only notice was required in this case. App. p. A19.

Moreover, the plain language of Rule 23(a)(4) requires fair and adequate representation in every class action and the Advisory Committee's note describes this as a "necessary" condition for "any class action." 39 F.R.D. at 100. In *Eisen*, this Court made it clear that class action prerequisites cannot be ignored on a random basis: "[I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." *Supra* at 2152. Contrary to the clear import of this passage on construing Rule 23, the Tenth Circuit has effectively read (a)(4) out of Rule 23 and established a precedent which will surely undermine the adequacy requirement unless this Court takes corrective action.

4. This Court Should Halt the Practice in Rule 23(b)(3) Class Actions of Postponing the Class Determination Under Rule 23(c)(1) Until a Settlement Is Proposed and Then Giving a Single Combined Notice Under Rules 23(c)(2) and 23(e).

M.D.L. 55 was pending for 14 months before the District Court indicated its readiness to determine whether the actions could be maintained as class actions. Even then, the trial court permitted unsupervised settlement negotiations to continue for 2 more months among the parties to M.D.L. 55, all of whose interests were antagonistic to Ohio. Only after a proposed settlement was reached by them were the class action determinations under Rule 23(c)(1) made and the classes defined. As a result only a single combined notice was sent out despite the discrete requirements of Rules 23(c)(2) and 23(e).

This notice advised those who received it of (1) their option to be excluded from the class or classes upon timely request, (2) their necessary inclusion in any judgment rendered absent an opt-out request, and (3) their right to appear by personal counsel. By combining what should have been separate notices, the right to enter an appearance was reduced to the right to be heard on the approval of the proposed settlement, the distribution of the settlement fund, the allowance of legal fees and similar matters. Basic questions such as whether the requirements of Rules 23(a) and (b) had been met and the definition of the classes under Rule 23(c)(1) were simply not on the agenda. As a result of the pressure for settlement put on Judge Thomsen at the July, 1972 hearings, there never was any real inquiry into the coextensiveness of interests or hostility between the named plaintiffs and potential class members, the capacity of the named plaintiffs to provide adequate representation for Ohio's interests, and the need to create a subclass under Rule 23(c)(4). This surely compromised the protective scheme built into the requirements of Rule 23.

In reversing the grant of relief, the Tenth Circuit apparently endorsed the practice of postponing the class action determination until a settlement has been reached and then giving a single combined notice of both. App. p. A18. This practice is condemned by the 1973 edition of the *Manual for Complex Litigation*.

The *Manual* warns against premature settlement negotiations before the class action determination has been made:

> Before any settlement negotiations occur, there should be a class action determination. Thereafter, all settlement negotiations on behalf of the class should be

conducted by counsel representing the class in the litigation. *Id.* at 24.

It lists nine reasons why "tentative classes for the purpose of settlement . . . should never be formed." Six of them are especially relevant to this case:

> (1) Rule 23 does not authorize formation of tentative classes for the purpose of settlement.
>
> (2) There can be no assurance that the class members will be adequately represented in the settlement negotiations until the findings which are condition precedent to the formation of a class are made by the court after an opportunity for an evidentiary hearing. Formation of a tentative class for the purpose of settlement with a requirement that the class member accept the settlement or opt out and litigate independently denies to the members of the class the opportunity to show the inadequacy of the representation of the class by the representative party or parties agreeing to the settlement and their counsel.
>
> (3) The appropriate membership of the class and the identity of the members cannot be determined in the absence of an opportunity for hearing and judicial findings of fact and conclusions of law. Nor can there be any assurance that the tentative class will be composed of interests which are not conflicting. . . .
>
> (4) In the absence of the development of the information relevant to liability, damages, and the expense of preparation for trial and of trial, there cannot be a fair recognition in settlement negotiations of the potential liability of the party or parties opposing the class and the potential damages that might be recovered for the class.

* * * * *

(6) The formation of a tentative class for the purpose of settlement denies to the class member the choice contemplated by amended Rule 23 to become a member of the proposed class for the purpose of litigation with adequate representation as a member of a litigating class.

(7) Formation of such a class denies to a member of the class the right to appear in the action as a party and to maintain the position of a litigating party. *Id.* at 24-25.

Moreover, the *Manual* advocates that the two separate notices be given as required by the Rule, one under 23(c)(2) and one under 23(e). *Id.* at 22.

This Court should give the federal courts much needed guidance in administering the Rule 23(c)(1) class action determination, the timing of the Rule 23(c)(2) notice, the conduct of settlement negotiations, and the approval of settlements under Rule 23(e). Otherwise, the understandable desire, sometimes dictated by expediency, to bring class actions to an early termination by settlement will continue to encourage federal judges to permit the short-circuiting of fundamental rights seen here.

5. The Tenth Circuit Exceeded the Proper Scope of Appellate Review and Undercut the Trial Court's Discretion to Grant Relief Under Rule 60(b) from a Judgment in a Class Action.

Rule 60(b) gives a district court broad discretion to "relieve a party or his legal representative from a final judgment, order, or proceeding." *See* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §2857, pp. 157-

158 (1973). As this Court stated in *Klapprott v. United States*, 335 U.S. 601 (1949):

> In simple English, the language of the "other reason" clause [Rule 60(b)(6)], for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. *Id.* at 614-615.

The District Court granted Ohio relief on "the totality of the evidence" under the "other reason" clause of Rule 60(b)(6). App. p. A51; 59 F.R.D. at 683. That "the totality of the evidence" in a given case may justify the grant of relief under Rule 60(b)(6) is well established.[10]

The exceptional facts and circumstances which the District Court emphasized in granting Ohio relief on "the totality of the evidence" were: (1) "none of the class representatives had been a Class C Creditor in the Chapter X proceedings"; (2) "the differences between the claims of Ohio and other class members"; (3) "the provisions of the order and judgment dealing specifically with the Ohio and Ohio-related claims" and (4) "the lulling effect of the dealings which the attorneys for Ohio had with the attorney for the Chapter X Trustee and the attorneys for some of the M.D.L. 55 defendants". App. pp. A49-A50, A51; 59 F.R.D. at 682, 683. Moreover, Judge Thomsen found that "Ohio has made a strong case that the judgment

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10. The Tenth Circuit upheld Judge Thomsen's conclusion on this point. App. pp. A14-A15. *See, e.g., Klapprott v. United States, supra* at 613-615; *Bibeau v. Northeast Airlines, Inc.*, 429 F.2d 212, 214 (D.C. Cir. 1970); *Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5, 8 (5th Cir. 1970); *Hutton v. Fisher*, 359 F.2d 913, 916 (3d Cir. 1966); *Laguna Royalty Co. v. Marsh*, 350 F.2d 817, 823 (5th Cir. 1965); *Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963); *Rooks v. American Brass Co.*, 263 F.2d 166, 168 (6th Cir. 1959).

should be held void as to all the claims of Ohio" in his initial opinion (App. p. A51; 59 F.R.D. at 683), restated that view in his supplementing opinion (App. p. A53), and adhered to that position in the judgment (App. p. A54). But he ultimately concluded that his grant of relief on "ground (6) of Rule 60(b)" made "it unnecessary for the Court to decide whether relief should be granted under ground (4) of Rule 60(b)". *Id.*

Despite the District Court's unambiguous statement that relief was granted under Rule 60(b)(6), the Tenth Circuit thought it desirable to recount "the lower court's decisional process . . . in order to demonstrate that the court did not pigeonhole its basis for relief into any particular one of the Rule 60(b) categories." App. p. A14. It then rejected the District Court's own statement and concluded, in an extraordinary excursion into extrasensory perception, that "the real basis for the court's decision below . . . was its belief that under all of the circumstances presented Ohio was simply denied due process of law." App. p. A15.

The net effect of this tour de force was that the Tenth Circuit substituted its judgment on the facts for that of the District Court. The Tenth Circuit felt that it could decide on appeal "whether, under all of the circumstances, the relief granted was justified." App. p. A14. This clearly was improper. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485, 495 (1950).

In reviewing a grant of relief under Rule 60(b), the scope of proper "[a]ppellate review is limited to determining whether the district court abused its discretion." 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §2857, p. 158 (1973). An appellate court "will not set

aside the district court's exercise of discretion unless it is persuaded that under the circumstances of the particular case the action of the district court is an abuse of discretion." *Id.* at §2872, p. 261. This standard for appellate review of decisions on Rule 60(b) motions has been recognized by the courts in the nine circuits which have considered the matter, including the Tenth Circuit[11] (except in this case). Here, the Tenth Circuit did not even mention abuse of discretion, let alone apply the established standard in measuring it. Instead it simply ignored any element of discretion which the trial court properly had in considering a motion under Rule 60(b).

The unique expertise of the District Court in this case graphically demonstrates the importance of adhering to the proper scope of appellate review. This was a consolidated, multidistrict action over which Judge Thomsen had presided for 19 months at the time Ohio filed its motion. This experience gave him a familiarity with M.D.L. 55 which fully qualified him to decide Ohio's motion and disqualified the Tenth Circuit from superimposing its own views in areas of trial court discretion. The development of competence in a transferee judge to insure the proper management of complex litigation is the very genius of proceedings under 28 U.S.C. §1407; similarly, the application of a trial judge's special expertise is the essence of Rule 60(b). Neither should be sacrificed to ad hoc intrusions by a court of appeals in the absence of an abuse of discretion by a district court.

The Tenth Circuit so far departed from the accepted and usual course of appellate review as to justify this

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11. *Nichols v. United States*, 460 F.2d 671, 675 (10th Cir. 1972), *cert. denied*, 409 U.S. 966 (1972). See 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §2872, pp. 261-262, n.6, Supp. p. 8 (1973) and cases cited therein.

Court in exercising its supervisory role over the lower federal courts, thereby insuring the effectiveness of 28 U.S.C. §1407, Rule 23, and Rule 60(b).

CONCLUSION

Any notion that the granting of Rule 60(b) relief from judgment in a proper case undermines class actions is specious. Rule 60(b) provides protection for, not erosion of, class action judgments. The stability of such judgments can best be achieved by this Court's directing trial judges to assure adequate representation of absent class members throughout all stages of all class actions. This will preclude later collateral attack. More fundamentally, it will assure all absent class members due process of law whether the case is fully litigated or terminated by settlement.

Respectfully submitted,

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